

**OPEN RECORDS AND MEETINGS OPINION
2002-O-04**

DATE ISSUED: February 25, 2002

ISSUED TO: Cal Rolfson, Special Assistant Attorney General, North Dakota Board
of Nursing

CITIZEN'S REQUEST FOR OPINION

On January 22, 2002, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Penni Weston asking whether the North Dakota Board of Nursing violated N.D.C.C. § 44-04-18 by charging her a fee for copies of open public records that exceeded the Board's actual cost of making the requested copies.

FACTS PRESENTED

In December 2001, Ms. Weston requested and received more than 60 pages of records from the North Dakota Board of Nursing (Board). The Board waived the fee for making and mailing the requested copies because Ms. Weston is a current licensee of the Board. After Ms. Weston reviewed the copies initially provided by the Board, she requested copies of additional records. The Board provided 21 regular sized pages with copies on both sides of the page and five legal sized pages with copies on only one side. Ms. Weston was charged \$8.15 for the copies. The January 7, 2002, invoice she was given by the Board breaks down the fee as follows:

\$1.00/FIRST PAGE	\$1.00
\$.25/PAGE X 25 PAGES	\$6.25
\$.90/STAFF TIME	\$0.90
NO POSTAGE CHARGE	

Ms. Weston paid for the copies when she picked them up at the Board office.

Ms. Weston made a third request for records and the Board responded on January 10, 2002, by mailing her seven regular sized pages with copies on both sides of the page and one regular sized page with a copy on only one side. The Board charged Ms. Weston

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\$3.75 for the copies using the same fee schedule in the prior invoice but did not charge her for mailing the records. The fee consisted of \$1.00 for the first page, \$0.25 per page for the additional seven pages, and \$1.00 for staff time. In the Board's explanation of the fee to Ms. Weston, the Board indicated the \$1.00 for the first page was to cover "the time it takes to locate the documents and verification of request and cost of photocopying." The \$1.00 charge for "staff time" was based on the hourly wage and time necessary for a Board employee to "process the request." Ms. Weston did not pay the \$3.75 fee and requested this opinion.

ISSUE

Whether the North Dakota Board of Nursing violated N.D.C.C. § 44-04-18 by charging a fee for copies of open public records that exceeded the Board's actual cost of making the requested copies.

ANALYSIS

Section 44-04-18, N.D.C.C., specifies the fee that a public entity may charge for providing access to open public records or making copies of those records.

Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. A request need not be made in person or in writing, and the copy must be mailed upon request. The entity may charge a reasonable fee for making or mailing the copy, or both. An entity may require payment before making or mailing the copy, or both. . . . As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including labor, materials, postage, and equipment, but excluding any cost associated with excising confidential or closed material under section 44-04-18.8. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

N.D.C.C. § 44-04-18(2). This subsection authorizes two separate fees, one for copying public records and one for locating records if it takes the public entity longer than one hour to find the requested records. See 2000 N.D. Op. Att'y Gen. O-11. In this case, it did not take the Board longer than one hour to find the requested records and the question in this

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opinion is limited to the “reasonable fee” authorized in N.D.C.C. § 44-04-18(2) for making copies of public records.

Unless it takes a public entity longer than one hour to find the requested records, N.D.C.C. § 44-04-18(2) effectively maintains free access to public records, but allows a public entity to offset its entire cost of making copies of those records upon request. 1998 N.D. Op. Att’y Gen. O-03. “The definition of ‘reasonable fee’ in N.D.C.C. § 44-04-18(2) limits a public entity to charging no more than its actual cost of making the copies, including labor, materials, and equipment.” 1998 N.D. Op. Att’y Gen. O-22. See also 1998 N.D. Op. Att’y Gen. O-04. “[T]he largest part of a public entity’s actual expense in making copies will usually be the labor charge” 1998 N.D. Op. Att’y Gen. O-03.

In 1998 N.D. Op. Att’y Gen. O-22, the public entity charged a flat fee of \$0.25 per page. However, when asked to itemize its actual cost of copying public records, the public entity conceded its actual cost was slightly less than \$0.08 per page. While the fee in that opinion may not have included the full cost of the labor involved in making copies, the conclusion is relevant to this opinion: even a nominal fee of \$0.25 per page may be too much for a public entity to charge for copies of public records under N.D.C.C. § 44-04-18(2) if the total copying charge exceeds the public entity’s actual cost of making the copies.

In reviewing a public entity’s actual cost of making photocopies of documents, it is helpful to separate the fixed costs associated with each copy (materials, equipment and postage) from the labor cost that will vary with each request. In the Board’s response to the request for this opinion, it indicates an average fixed cost of \$0.03 per image, taking into account that some documents were copied on both sides of a page and that some documents needed to be copied on legal sized paper. Thus, the actual cost to the Board of making the copies requested by Ms. Weston, excluding labor, was \$1.41 for the second request (47 images [21 two-sided copies, 5 one-sided copies] at \$0.03 per image) and \$0.45 for the third request (15 images [7 two-sided copies, 1 one-sided copy] at \$0.03 per image), for a total of \$1.86.

With regard to the labor expense incurred by the Board in making the copies requested by Ms. Weston, the Board indicated that a Board employee spent four minutes on each request to make the copies. The hourly wage of the employee is \$17.62, so the labor cost for making the copies requested by Ms. Weston was \$0.29 per minute for a total labor expense of \$2.32 (4 minutes for 2 requests at \$0.29 per minute). The overall expense to the Board of providing the copies requested by Ms. Weston was \$4.18, but she was charged a total of \$11.90.

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It is not clear how the Board determined the rates listed in its invoices to Ms. Weston. The three entries on each invoice (first page, additional pages, and staff time) appear to reflect duplicate charges for the labor expense to the Board for making the requested copies. In response to this opinion request, the Board suggests its actual copying expense per page is \$0.32, based on its fixed cost of \$0.03 per image and the labor charge of \$0.29. However, this figure is clearly in error because the Board's employee is able to make more than one copy per minute on average.

In her request for this opinion, Ms. Weston disagrees with the higher rate of \$1.00 for the first page copied by the Board. However, this higher rate can be easily understood. It takes a certain amount of time for an employee to leave the employee's desk, make a copy of a one-page document, and put the document in an envelope for mailing to the requester. The amount of time it takes for an employee to make and mail a requested document does not double if the document is two pages long rather than one page. Rather, the labor expense to a public entity for each additional page is significantly less than for the first page. This fact is proven in this case, where an employee spent roughly the same amount of time (four minutes) to make 47 copies and 15 copies.

While a public entity may reasonably spread out the initial labor cost over a number of copies by charging a flat fee such as \$0.25 per page, N.D.C.C. § 44-04-18(2) prohibits a public entity from charging more than its actual expense in making the requested copies. At some point, the flat fee for each additional copy may need to be reduced due to a corresponding decrease in the time needed to prepare the copy.

The situation in this opinion is very different from the situation in 1998 N.D. Op. Att'y Gen. O-04, in which the public entity charged \$1.00 per page for each page. In this case, Ms. Weston was only charged that rate for the first page that was copied at her request. The Board charged a significantly lower rate for each additional page. Nevertheless, the overall charge to Ms. Weston exceeded the Board's actual cost of making the requested copies and it is my opinion the Board violated N.D.C.C. § 44-04-18(2).

Although the amount of the copying fee at issue in this case is small and out of proportion to the time spent responding to the request, I am hopeful this opinion will be instructive on the copying fee public entities are permitted to charge under N.D.C.C. § 44-04-18(2).

CONCLUSION

The North Dakota Board of Nursing violated N.D.C.C. § 44-04-18 by charging a fee for copies of open public records that exceeded the Board's actual cost of making the requested copies.

STEPS NEEDED TO REMEDY VIOLATION

Ms. Weston has already paid \$8.15 for copies of records and the Board has given her an invoice for an additional \$3.75. The total fee the Board should have charged for the two requests, as computed in this opinion, is \$4.18. Accordingly, the Board needs to cancel its second invoice and refund Ms. Weston her overpayment of \$3.97 (\$8.15 - \$4.18).

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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